United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-7692

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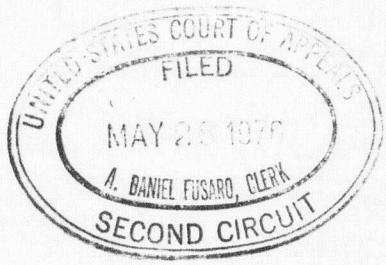

Docket No. 75-7692

MILTON RAFFER,

Plaintiff-Appellee,

vs.

ROY M. COHN, THOMAS BOLAN, SCOTT E. MANLEY, DANIEL J. DRISCOLL, MELVIN RUBIN, MICHAEL ROSEN and HAROLD L. SCHWARTZ, Members of the law firm of SAXE, BACON & BOLAN,

Defendants,

SAXE, BACON & BOLAN, ROY M. COHN, MICHAEL ROSEN, DANIEL J. DRISCOLL and SCOTT E. MANLEY,

Defendants-Appellants,

MICHAEL ROSEN,

Petitioner.

On Appeal From Judgment of the United States District Court
For the Southern District of New York

PETITION FOR REHEARING
WITH A SUGGESTION FOR REHEARING IN BANC

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On May 17, 1976 this Court affirmed the judgment against the defendant-Appellant Michael Rosen. For the reasons herein set forth, the petitioner respectfully requests a rehearing with a suggestion for rehearing in banc.

This petition for rehearing in banc is necessitated by the erroneous inclusion of the defendant Michael Rosen in the judgment entered against the defendants-appellants in Milton Raffer v. Roy M. Cohn, et al. During the trial of this case before Judge Gagliardi (District Judge, Southern District of New York), defendants by their attorney made motions to dismiss plaintiff's cause of action. In reviewing the defendants' motions to dismiss, Judge Gagliardi entered into the following colloquy (T-127):

> "The Court: Now we have a little housekeeping to do here. You have sued Mr. Cohn, and I would find that under the circumstances of this case he individually and as a member of the firm of Saxe, Bacon and Bolan is a proper defendant. Mr. Bolan is presumably of counsel, Mr. Franzblau. Do you want to be heard on that?
>
> Mr. Franzblau: No.
>
> The Court: Dismissed as to Mr. Bolan. Mr. Manley, I think there is proof here that he was a member of the firm, and Mr. Driscoll, a member of the firm.
>
> Mr. Rubin and Mr. Rosen at the time complained of here were associates?
>
> Mr. Franzblau: Yes, Your Honor.
>
> The Court: And motion to dismiss as to them is granted." (Emphasis added.)

Therefore, it is beyond peradventure that the Court dismissed the complaint against the defendant Michael Rosen and did not in any manner change its decision. Although Mr. Franzblau requested to be heard on the Court's granting of defendants' motion as to Mr. Rubin and Mr. Rosen, Judge Gagliardi never reversed his decision even though he admittedly

had the power to do so. Upon granting Mr. Franzblau's request to be heard, the following colloquy ensued (T-127-129):

> "Mr. Franzblau: If Your Honor please, the mere fact that they both worked on the brief -- there is testimony they both worked on the brief -- so that the mere fact that they are employees does not excuse them. The firm is held in on the basis of perhaps respondent superior, but as far as the third party, the same thing in a --
>
> The Court: There is no proof that Mr. Rosen or Mr. Rubin received any of the fee here or made any deal separately with Mr. Raffer, is there?
>
> Mr. Franzblau: No; but, Your Honor, if they were negligent they are responsible for damages. If you drive my car on an errand in my employ, and even though you are not going to get reimbursed for it, the fact is, if you were guilty of negligence too, the mere fact that you are an employee does not exculpate you from liability.
>
> The Court: What is Mr. Rubin's negligence?
>
> Mr. Franzblau: The testimony is, he worked on this.
>
> The Court: But he does not have the responsibility for filing a substitution of attorneys.
>
> Mr. Franzblau: Mr. Rosen in his affidavit says that he worked and he undertook it and he filed the papers and he did not file the substitution of attorney, and he undertook the responsibilities for the filing, and he did not cause the substitution of attorney to be filed. He was the one who filed the papers; he was the one who was working on the brief. He applied for the extension.
>
> The Court: I am looking at your complaint now. Paragraph 3 says: 'On or about October 27, 1971, the plaintiff retained the services of defendant Roy Cohn and the services of defendants Bolan, Manley, Driscoll, Rubin, Rosen and Schwartz, members of the said law firm.' Mr. Rubin certainly was an associate until after the 1st of the year.
>
> Mr. Franzblau: I was referring to Mr. Rosen.

> The Court: That is what I say. Mr. Rosen did not go with the firm until January of 1972.
>
> Mr. Franzblau: Yes, Your Honor, but Bacon, Bolan took the responsibility, and he as an employee in that firm said he did the brief, he was the one who made the application for the extension, he is the one who is responsible basically in the firm for the negligence of the firm.
>
> I would like to invite your attention to this case of State v. Graham --
>
> The Court: I know that the person who does it even though he is an employee can be held ultimately liable and can be initially liable. I am aware of that proposition of law." (Emphasis added.)

As is quite apparent, Judge Gagliardi was fully cognizant of the propositions of law presented by the attorney for the plaintiff and decided to dismiss against Mr. Rubin and Mr. Rosen, regardless of those propositions. Furthermore, if Judge Gagliardi intended to reverse his decision, he would necessarily have given defendants' attorney an equal opportunity to be heard. While plaintiff-appellee contends that Judge Gagliardi did in fact reverse his decision, they cannot point to anything in the record which substantiates that view, because the record is barren of any such determination. In fact, plaintiff contends that the Court only reversed its decision as to Mr. Rosen and not Mr. Rubin. If this was the case, one would reasonably assume that such a decision would be clearly delineated. However, no such position can be found in the record. In asserting that the Court reversed as to defendant Rosen, plaintiff-appellee relies solely upon the Court's pronouncement of its judgment (T-141).

> "The Court:. . .In sum I find for the plaintiff in the first cause of action against all defendants remaining in the sum of $13,528.03, together with interest from the date of payment --
>
> Mr. Weiss: Would Your Honor please clarify the phrase ' all defendants remaining'?
>
> The Court: . . . The remaining defendants, as I believe they stand before the Court, are Roy M. Cohn, Scott E. Manley, Daniel J. Driscoll, Michael Rosen, and the firm of Saxe, Bacon and Bolan."

While the Court unequivocally dismissed the complaint against the defendant Michael Rosen in the morning session and did not in any manner change its decision, the Court directed entry of judgment, after a luncheon recess, in the manner previously depicted. The Court apparently overlooked its dismissal, in the morning session, of the complaint against the defendant Rosen. This position is affirmed by the language employed by Judge Gagliardi in entering judgment; namely: "The remaining defendants, as I believe they stand before the Court, . . ." (T-141). In light of its prior determination to dismiss as to defendants Rubin and Rosen and the absence of any change in that determination, entry of judgment against the defendant Michael Rosen was improper.

The foregoing presentation outlines the basis for the requested petition for a rehearing in banc. The Court of Appeals for the Second Circuit apparently overlooked or misapprehended the above issue, and thus a rehearing in banc is necessary.

CONCLUSION

It is therefore respectfully submitted that the Court grant said request for rehearing in banc, and that the Court find that judgment was improperly entered against the defendant Michael Rosen, and thus vacate said judgment as to him.

Respectfully submitted,

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